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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

In re S.M., a Person Coming
Under the Juvenile Court Law.

B277177
(Los Angeles County
Super. Ct. No. DK09416)

DANIEL M.,

Petitioner,

v.

THE SUPERIOR COURT OF
LOS ANGELES COUNTY,

Respondent;

LOS ANGELES COUNTY
DEPARTMENT OF CHILDREN
AND FAMILY SERVICES,

Real Party in Interest.

ORIGINAL PROCEEDING. Petition for extraordinary writ. (Cal. Rules of Court, rule 8.452.) D. Zeke Zeidler, Judge. Petition denied.

Los Angeles Dependency Lawyers, Law Office of Danielle Butler Vappie and Courtney Fisher for Petitioner.

No appearance for Respondent.

Mary C. Wickham, County Counsel, R. Keith Davis, Assistant County Counsel, and Peter Ferrera, Deputy County Counsel, for Real Party in Interest.

* * * * *

Petitioner Daniel M. is the father of 16-year-old S.M., a dependent of the juvenile court. Father has filed a petition for extraordinary writ pursuant to rule 8.452 of the California Rules of Court challenging the juvenile court's order terminating his reunification services and setting a hearing under Welfare and Institutions Code section 366.26.¹ We conclude that substantial evidence supported the juvenile court's finding that it would be detrimental to return S.M. to father's custody; the court did not abuse its discretion in declining father's request for additional reunification services; and the court did not abuse its discretion in declining father's request to liberalize his visits. We therefore deny father's petition.

¹ Undesignated statutory citations are to the Welfare and Institutions Code.

BACKGROUND

1. The Juvenile Court Assumes Jurisdiction over S.M. and Grants Father Reunification Services

On February 4, 2015, the Los Angeles County Department of Children and Family Services (DCFS) filed a section 300 petition, which as later sustained, alleged that father had a history of illicit drug use including use of methamphetamine, and father failed to make an appropriate plan for S.M.'s care.²

In December 2014, father relapsed, was arrested, and left S.M. in the care of a neighbor. DCFS removed S.M. from the neighbor's care and placed him in the home of his paternal uncle and aunt, where he thrived.

On February 4, 2015, father tested positive for amphetamines, methamphetamines, and marijuana. Father admitted to having a long history of drug use and to having recently started using drugs again. Father admitted to leaving S.M. in the care of a neighbor and explained that he had become homeless. Father had been evicted from the sober living home that he operated. Father conceded that he needed assistance and described his plan to reside in a different sober living home. Father also acknowledged using marijuana for back pain following surgery. He also admitted to selling drugs when he was young and to serving time in prison. Father indicated that he placed S.M. with a neighbor so that S.M. would not be homeless. On his own, father admitted himself into a rehabilitation program.

In addition to a long history of drug use, father had a long criminal history, including multiple counts of burglary and

² Mother is not a party to this proceeding and therefore the background with respect to her is not summarized.

multiple counts of driving with a suspended license or driving without a license and a felon possessing a firearm.

As part of his reunification program, the juvenile court ordered reunification services for father including a drug program and parenting classes, both of which father completed. Father also attended Alcoholics Anonymous and Narcotics Anonymous meetings. Father initially was limited to monitored visits with S.M. In October 2015, the court permitted father unmonitored visitation *if* he tested negative for controlled substances with no missed visits. In December 2015, DCFS reported that father had some unmonitored visits. In December 2015, father was living with a friend and her adult son. (Neither had any criminal history.)

In December 2015, S.M. wrote the court a letter expressing a strong desire to stay in the home of his paternal aunt and uncle. He explained: “My life has made a turn for the better. I have a new life in which I do not want to leave.” S.M. was doing well in school and extracurricular activities. S.M. grew and was fed regularly (which caused him to realize that he previously had not had enough food). S.M. further explained, “I have lived in a sober living for 7 years, I don’t want to do it anymore.” S.M. had lived with father in the sober living facility that father operated. Other family members also wrote letters explaining how S.M. had thrived in his current placement.

S.M.’s therapist reported that S.M. was concerned about what would happen to him if father started using drugs again. S.M. told the social worker that he wanted father to obtain his own housing, which was father’s ultimate goal.

2. After 12 Months the Juvenile Court Found Father Was in Partial Compliance with the Case Plan and Ordered Continued Reunification Services

In April 2016, DCFS reported that father had been sober for one year. However, father missed tests in July 2015, September 2015 and March 2016. And, on April 11, 2016, father tested positive for marijuana.³ His remaining tests were negative. The social worker was concerned that father warned S.M. he would “crush him in court” if S.M. did not tell the court that he wanted to live with father.

S.M.’s therapist reported that S.M. was concerned about his potential return to father’s custody because he was happy in his current placement. In a letter to the court, the therapist indicated that she “would be concerned if [S.M.] returns to live with his biological father given the past challenges [S.M.] has had to endure in his care.” Father spoke on the phone with S.M. twice a week but had not visited “in awhile” because, according to father, S.M. had wrestling meets on Sundays. S.M. said that his wrestling meets were not on Sundays and that father cancelled visits because of the cost of gasoline. DCFS reported that between January and April 2016 father visited only twice.

S.M. wrote another letter to the court indicating that he wanted to remain in his current placement. He explained that he had a “fully organized and deep rooted life,” was doing well in high school, had friends, and extracurricular activities.

Father was working trimming trees. He greatly missed S.M.

³ Father told a social worker that he was with someone who smoked marijuana.

The court found that father was in partial compliance with the case plan and ordered continued services.

3. At the 18-Month Hearing the Court Denied Additional Reunification Services and Set a Section 366.26 Hearing to Determine S.M.'s Permanent Plan

In August 2016, DCFS reported that S.M. continued to thrive in the care of his paternal aunt and uncle. S.M. wanted to continue living there and attending his high school where he had made friends and was participating in extracurricular activities.

Father planned to have a conjoint counseling session with S.M. But there had been no conjoint sessions as of August 2, 2016. Father had enrolled in weekly individual therapy.

S.M. was the only witness at the 18-month review hearing.⁴ He stated that he was almost 16 years old and wanted to remain in his current placement with paternal aunt and uncle.

The court found that returning S.M. to father's custody would pose a substantial risk of detriment. The court found no probability or likelihood of return if father were given additional reunification services. The court denied father's counsel's request to liberalize father's visits from monitored to unmonitored. Father then petitioned this court for extraordinary relief.

DISCUSSION

As we shall explain, father has not demonstrated that the order terminating his reunification services should be set aside, that S.M. should be returned to his custody or that the juvenile court erred in requiring monitored visits *at the time* the court made that order.

⁴ S.M. was not placed under oath at the hearing.

1. Substantial Evidence Supported the Finding of Detriment

First, father argues that the record lacks substantial evidence that there was a substantial risk of detriment to S.M. by returning him to father's custody.

Section 366.22 provides that within 18 months after a dependent child was originally removed from the physical custody of his parent, a permanency review hearing must occur to review the child's status. At the hearing, "the court shall order the return of the child to the physical custody of his or her parent or legal guardian unless the court finds, by a preponderance of the evidence, that the return of the child to his or her parent or legal guardian would create a substantial risk of detriment to the safety, protection, or physical or emotional well-being of the child." (§ 366.22, subd. (a).) There is a presumption that until reunification services are terminated a child will be returned to a parent's custody. (*In re Yvonne W.* (2008) 165 Cal.App.4th 1394, 1400.)

"A substantial risk of detriment means that 'returning a child to parental custody represents some danger to the child's physical or emotional well-being.'" (*In re E.D.* (2013) 217 Cal.App.4th 960, 965.) The juvenile court's determination is reviewed for substantial evidence. (*Angela S. v. Superior Court* (1995) 36 Cal.App.4th 758, 763.) In reviewing the evidence, we must construe it in the light most favorable to the juvenile court's determination. (*James B. v. Superior Court* (1995) 35 Cal.App.4th 1014, 1021.) "The Court of Appeal is not a second trier of fact" (*Ibid.*)

Although father made substantial progress since the inception of the dependency case, he tested positive for marijuana

in April 2016.⁵ More significantly, S.M.'s therapist expressed concern about returning S.M. to father's care. There was evidence S.M. suffered anxiety over concern that father may start using drugs again and over being returned to father's custody. Additionally, although father initially visited consistently, his visitation decreased dramatically over the course of the dependency period. This evidence supported the juvenile court's determination that it would be detrimental to return S.M. to father's custody.

2. No Error in Terminating Father's Reunification Services

The parties correctly point out that the juvenile court had limited discretion to extend the reunification period beyond the 18-month date. (*Andrea L. v. Superior Court* (1998) 64 Cal.App.4th 1377, 1388; *In re Daniel G.* (1994) 25 Cal.App.4th 1205, 1214.) We find no abuse of discretion in the court's order denying father continued reunification services beyond the 18-month period.

Although father's efforts to reunify with S.M. must not be minimized, the record supported the juvenile court's conclusion that father was unlikely to reunify if provided additional services.

⁵ In *Rita L. v. Superior Court* (2005) 128 Cal.App.4th 495, 505-506, the court held that a mother's single positive test for a controlled substance was not substantial evidence that her daughter could not be returned to her care. In that case, the mother accidentally took a Tylenol with codeine provided by her daughter. (*Id.* at p. 501.) Here, although father reported that he did not smoke marijuana but instead was with people who smoked marijuana, there is no indication the juvenile court accepted his version. Moreover, there was other evidence in addition to father's positive test for marijuana.

Father's significant strides in combating his abuse of controlled substances were tempered by his decision to limit his visits with S.M. Moreover, father's positive drug test as late as April 2016 suggested that father continued to have unresolved addiction issues despite his participation in an extensive rehabilitation program. There is no support for father's argument that in denying additional reunification services the juvenile court improperly relied on S.M.'s desire to live with his aunt and uncle.

This case is different from *In re Yvonne W.*, *supra*, 165 Cal.App.4th 1394 because in *Yvonne W.* the mother "did everything . . . asked of her, including eliminating the conditions that led to" her daughter's placement. (*Id.* at p. 1401.) In contrast, here father tested positive for a controlled substance, missed tests, and missed numerous visits with S.M. Although in *Yvonne W.* the court held that a child's dislike of a parent's living arrangement is insufficient to demonstrate detriment, here other evidence supported the finding of detriment. (*Ibid.*)

3. The Court Did Not Abuse Its Discretion in Ordering Monitored Visits

Finally, father argues that the juvenile court abused its discretion in refusing to change his visits from monitored to unmonitored. We may not substitute our discretion for that of the juvenile court. (*In re Emmanuel R.* (2001) 94 Cal.App.4th 452, 465.) We conclude that father fails to demonstrate the juvenile court abused its discretion.

When father had unmonitored visits, he frequently cancelled his visits. The court permitted his visits to remain unmonitored if he tested negative and did not miss any drug tests. However, in April 2016—four months prior to the 18-month hearing—father tested positive for marijuana. Given

father's long history of drug use, the juvenile court may have been concerned about this test and on that basis denied father's request for unmonitored visitation. Moreover, when father's counsel made the request for unmonitored visitation at the 18-month review hearing, father had not visited S.M. for a month and a half.

Nevertheless, as the record demonstrates progress on father's part, we encourage the juvenile court to reconsider the status of father's visitation at the upcoming section 366.26 hearing. Our record does not include the events since August 2016 and therefore we express no opinion on whether father should be given unmonitored visitation based on events subsequent to August.

DISPOSITION

The petition is denied. This opinion is final forthwith as to this court pursuant to rule 8.490(b)(2)(A) of the California Rules of Court.

FLIER, J.

WE CONCUR:

BIGELOW, P. J.

RUBIN, J.